

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Claimant contends the avascular necrosis in her right hip was aggravated by the bending and lifting associated with her job with

respondent. Respondent contends that the condition is the result of claimant's many years of smoking and her overweight condition.

The following issues are raised to the Board in respondent's Application For Review By The Workers Compensation Appeals Board, filed on February 17, 2010, with the Workers Compensation Division. However, these issues were not raised to the ALJ at the preliminary hearing nor were they decided by the ALJ in the February 16, 2010, Order.

2. What is the date of accident in this matter? Claimant alleges a date of accident beginning in 2007 and continuing through February 19, 2009. Respondent in its brief to the Board contends that if claimant suffered a work-related accident or accidents, they occurred in 2007, when respondent had two patients sleeping on mattresses on the floor and claimant had to assist them several times per day to get up for various activities. Claimant alleges a series of accidents from the daily activities of her job. This lasted until February 19, 2009.
3. Did claimant provide timely notice of her alleged accidents? Claimant testified that she discussed her ongoing hip problems with her supervisor on several occasions and even requested pain medication on more than one occasion. Respondent contends claimant's injuries occurred in 2007 and notice was not provided until July 2009, when respondent received claimant's written claim from her attorney.
4. Did claimant file timely written claim in this matter. Again, claimant alleges a series of accidents through February 2009 and respondent contends claimant suffered specific traumatic injuries in 2007. The July 2009 written claim would be timely with claimant's accident scenario and untimely with the dates alleged by respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as a certified nurses aide (CNA) for respondent for several years. Her job required that she assist patients, weighing up to 400 pounds, to get in and out of bed, wheel chairs and bathrooms. At one point in 2007, respondent had two patients sleeping on mattresses on the floor due to concerns that they might fall. Claimant had to assist these patients as well. Claimant began noticing pain in her right hip in 2007. The pain increased with the lifting being done at work. Claimant advised her charge nurse, Jamie Brian, of the problem and was even given pain medication in the form of Tylenol for the pain. The pain did not get better and, in fact, worsened through February 2009, when claimant requested medical treatment. Additionally, at some point in 2009, claimant began using crutches at work due to the difficulties she was experiencing with her hip. Claimant acknowledged that she had hip pain when putting on shoes and clothes, when

climbing in and out of cars and when going to the bathroom. Claimant had pain with practically all physical activities involving her hip. Because of her ongoing problems, claimant had to limit her physical activities at home, doing only limited cleaning and other household chores.

Claimant initially sought medical treatment on her own at the Wesley Medical Center emergency room (ER) on February 19, 2009. Claimant complained of significant right hip pain and walked with a limp and used crutches. Respondent contends that claimant's hip problems stem from her long history as a smoker and her overweight condition. Additionally, medical records from the Hunter Health Clinic display a history of right hip difficulties from April 14, 2008. Claimant was diagnosed with arthritis in the hip, and pain medication was prescribed. X-rays were recommended, but claimant had no health insurance and was unable to pay for the x-rays as of April 16, 2008. The Hunter Health Clinic records continue through March 2, 2009, at which time claimant continued to complain of right hip pain. The report of March 2 indicates a history of hip pain for 1½ years. There is no history of the cause of this hip pain in the Hunter Health Clinic records.

When claimant went to the Wesley Medical Center ER on February 19, 2009, she was experiencing significant right hip pain. The history in the Wesley Medical Center ER records notes hip pain while walking. Additionally, claimant walked with a limp and used crutches because of the pain. The pain is noted to have worsened within the last week, although no reason was given for the increased pain. The ER records also note a history of hip pain for 1½ years. The Wesley Medical Center ER records indicate that claimant is a CNA, but contain no information leading to any work involvement with the hip problem. The Diagnostic Imaging Report from February 19, 2009, discusses a flattening of the femoral head with sclerosis representing avascular necrosis. The medical reports indicate claimant has no insurance and the ER personnel were attempting to locate a medical facility who will take claimant on a charity basis. Claimant's referral back to Hunter Health Clinic on March 2, 2009, was apparently the result of these activities by the ER personnel. Claimant continued treating with the Hunter Health Clinic until September 16, 2009. However, the record contains no records from the Hunter Health Clinic after March 2, 2009.

Claimant was referred by her attorney to George G. Flutter, M.D., for an evaluation on August 27, 2009. Claimant was diagnosed with a history of right hip pain and was determined to have avascular necrosis in the hip. Claimant also reported pain in the right and left shoulders, the right and left hands, right hip/groin/buttocks and right knee. Claimant's injury history detailed her employment with respondent. The right hip condition was found to be related to her work for respondent. The pain in her upper extremities stemmed from the ongoing use of crutches. Claimant was returned to work with restrictions, which placed her in the sedentary level of physical demand.

Claimant was referred by respondent to board certified neurological surgeon Paul S. Stein, M.D., for an evaluation on December 1, 2009. The work history provided to Dr. Stein was similar to that provided to Dr. Flutter. Additionally, the pain complaints were almost identical. However, the primary pain was to the right hip, with upper extremity pain being secondary. Both Dr. Stein and Dr. Flutter make note of claimant's history of smoking. Dr. Stein also notes claimant weighs 243 pounds and is described as obese. Claimant's avascular necrosis was found to stem from claimant's long-term, heavy smoking habit and her obesity. Claimant's work activities were seen as "secondary and minor compared to the factors noted above."¹ Dr. Stein opined that the work activity might increase pain, but is not a significant factor in the development of the deterioration of the hip. Dr. Stein acknowledges the upper extremity pain likely stems from the use of crutches.

Claimant was referred by the ALJ to Terrence Pratt, M.D., for an independent medical evaluation (IME) on January 5, 2010. The history provided to Dr. Pratt is similar to that provided to both Dr. Stein and Dr. Flutter. Claimant described the right hip pain and the pain to her upper extremities. At the time of the examination, claimant's weight had reduced to 213 pounds. Dr. Pratt diagnosed probable avascular necrosis in the right hip, bilateral upper extremity pain of unknown etiology and obesity. Dr. Pratt also noted claimant's chronic nicotine use. Dr. Pratt agreed that the most significant factor in claimant's hip condition was non-vocational, but also agreed that claimant "had aggravation of underlying involvement."²

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

¹ P.H. Trans., Ex. 2.

² P.H. Trans., Ex. 1.

³ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁶

It is well established under the Workers Compensation Act in Kansas that when a worker’s job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁷

Claimant testified to several aggravations of her hip condition while working for respondent. Her description of the working conditions and job duties required in her job are largely uncontradicted. Dr. Fluter found claimant’s hip condition to have been aggravated by her work duties. Dr. Stein found the condition to stem from claimant’s smoking and obesity. Dr. Pratt, the IME doctor, found the condition to be primarily non-work related, but went on to find some aggravation from the job. His opinion is somewhat vague. But, it is enough, for preliminary purposes, to tip the scale in favor of claimant. It is found that claimant has satisfied her burden of proving that she suffered accidental injuries while working for respondent.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant’s request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board’s review of preliminary hearing orders is limited to specific issues as set forth in the statute.

⁵ K.S.A. 2009 Supp. 44-501(a).

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁸

The issues dealing with date of accident, notice and written claim were not mentioned at the preliminary hearing and were not determined by the ALJ in the preliminary hearing Order. While normally jurisdictional on appeal from a preliminary hearing, if issues are not determined by the ALJ, the Board will not obtain jurisdiction.

The Board is limited under K.S.A. 2009 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

Therefore, the appeal by respondent of issues dealing with the date of accident, timely notice and timely written claim are dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered a series of accidents which arose out of and in the course of her employment with respondent. The Order granting benefits is affirmed. The appeal of the issues dealing with the date of accident, timely notice and timely written claim are dismissed.

⁸ K.S.A. 44-534a(a)(2).

⁹ K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated February 16, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

HONORABLE GARY M. KORTE

c: Michael L. Snider, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge